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IN THE

# SUPREME COURT OF THE UNITED STATES

October Term, 1934. No. 395.

WILLIAM D. GORDON, Secretary of Banking of Pennsylvania, Statutory Receiver of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION,
*Petitioner,*

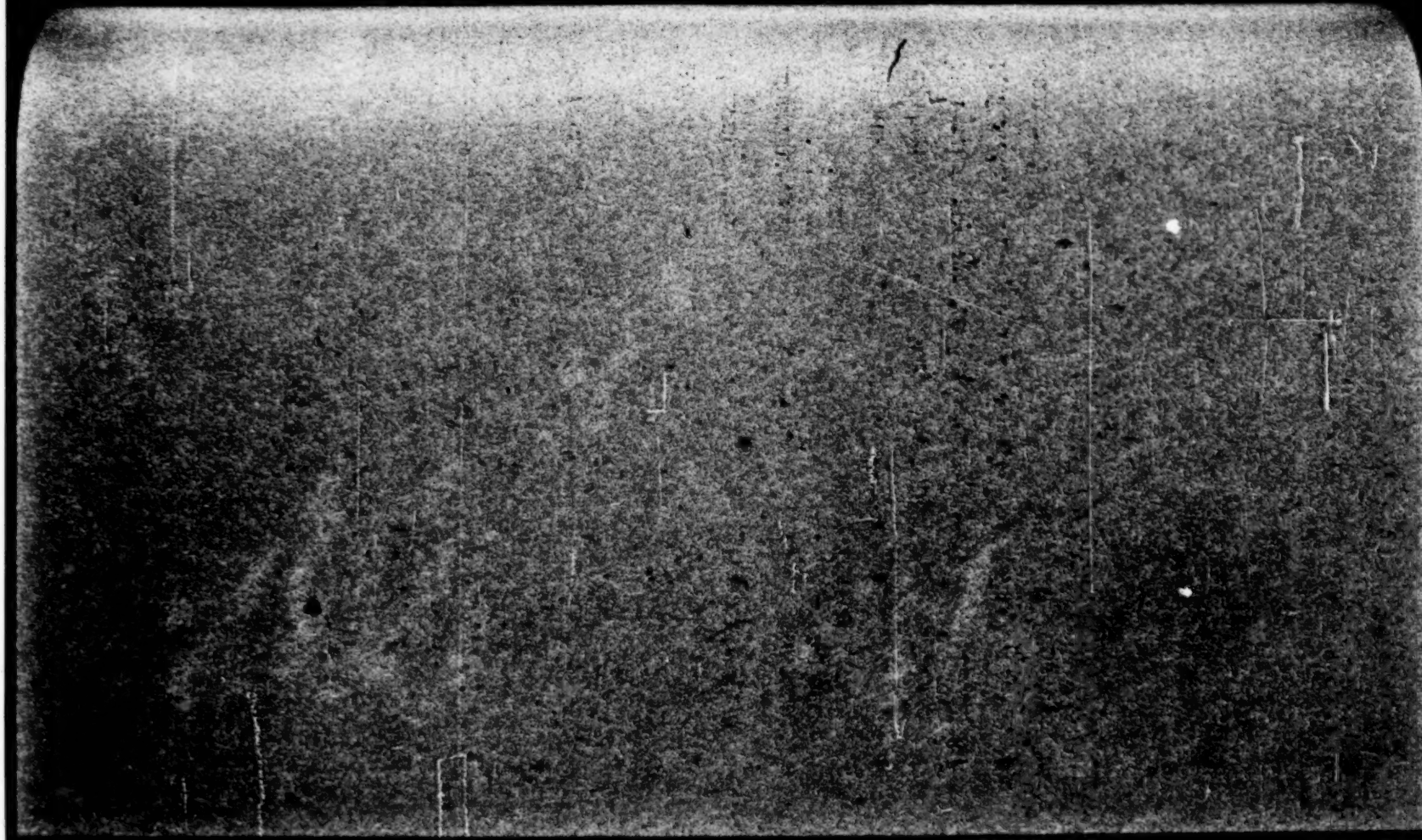
*v.*

JOSEPH OMINSKY and ROBERT B. ELY, 3RD, Federal Receivers of CHRISTIAN A. FISHER BUILDING AND LOAN ASSOCIATION, and HARVEY STEIGNER and IDA V. STEIGNER, His Wife, EDITH B. GOODE, JULES SKLAR and PHILIP ZINMAN,
*Respondents.*

## BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

G. C. LADNER,
OSCAR BROWN,
CHARLES POLIS,
*Attorneys for Respondents.*
1700 Bankers Trust Building,
Philadelphia, Pa.

Martin & Lyle, 302 Penfield Bldg., Phila., Pen. 0665, Keystn. Race 6067.



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*To the Supreme Court of the United States:*

The respondents respectfully submit to this Honorable Court the following brief in opposition to the petition for a writ of *certiorari:*

## STATEMENT OF THE CASE.

In view of certain *errata* on page 5 of the petition and misstatements of fact on page 21 of petitioner's argument where it is stated, "Nowhere in the bill of complaint or in any of the proceedings was it charged that the Secretary of Banking was guilty of neglect or delay in performing his duty. Liquidation was proceeding at a minimum of expense and without wastage of assets.," a restatement here is deemed necessary.

On March 31, 1933, a stockholder's Bill in Equity was filed in the District Court of the United States for the Eastern District of Pennsylvania on behalf of five named stockholders residing in New Jersey and all other stockholders who might wish to join in the Bill (R. 1). On the same day a motion for the appointment of receivers was filed, returnable April 21, 1933, (R. 13). On the same day the Bill and motion was duly served (R. 1).

The Bill averred (R. 4 et seq.) that the complainants' claims exceeded $7500.00, that the Christian A. Fisher Building and Loan Association, hereinafter referred to as Association, was indebted to certain preferred creditors to the extent of $200,000.00, that the Association was and had for a long time prior been hopelessly insolvent, that its capital of $1,000,000.00 had been impaired to the extent of $600,000.00, that its principal asset—mortgage loans—had depreciated approximately forty per cent, that all of its assets were in danger of being seized by the preferred creditors, that even though all of its officers were under criminal indictment for frauds committed against the As-

sociation they were still actively managing the Association, and that the respective investments of the complainants in the Association were in imminent jeopardy.

The Bill prayed, *inter alia,* for the appointment of a receiver and/or receivers (R. 10).

On April 18, 1933, the instant petitioner, being State Secretary of Banking, filed a suggestion that he had taken possession of the Association on April 8, 1933, or eight days *after* the Bill had been filed and served (R. 15). The complainants immediately filed objections to the possession of the petitioner which resulted in an agreement that the status quo be preserved pending determination by the District Court.

On the same day an Answer was filed by the petitioner which substantially admitted all the substantive averments of the Bill (R. 16, et seq.). In addition the Answer set forth (R. 20, par. 13) that the petitioner was ignorant of the Association's hopeless insolvency, great impairment of capital and woeful condition of mortgage loans prior to the time he took possession on April 8, 1933.

After several postponements the motion for appointment of a temporary receiver came up before Judge Dickinson of the District Court. He declined to appoint a temporary receiver and suggested that the matter be set down for final disposition (R. 23). It was then agreed by counsel representing the petitioner and the complainants that the case be disposed of on Bill and Answer, which resulted in Judge Dickinson appointing the respondents permanent receivers on July 24, 1933 (R. 25).

The petitioner then appealed from the order appointing the respondents receivers to the Circuit Court of Appeals for the Third Circuit who affirmed the decree of the District Court on the basis of an opinion filed simultaneously in the case of *Commonwealth of Pennsylvania v. John G. Williams, Et Al., Receivers of Mortgage Building and Loan Association,* in which case there was raised the same legal questions as in the instant case (R. 42, 43).

## ANALYSIS OF PETITIONER'S REASONS FOR ALLOWANCE OF THE WRIT.

These reasons set forth at pages 7-10 of the petition are, we submit, manifestly insufficient.

The alleged conflict between the instant case and *Amos v. Trust Co.*, 54 F. (2d) 286 (1931) and *Mitchell v. Lay*, 48 F. (2d) 79 (1930), is merely a distinction in the facts and not a conflict in the law. (Reason No. 1, Petition p. 7.)

The citation of *Shapiro v. Wilgus*, 287 U. S. 348, (1932) bears only on the question of discretion to be exercised by a District Judge. (Reason No. 2, Petition pp. 7, 8.)

Whether or not "it has been generally understood and believed throughout the Commonwealth that so-called quasi-public institutions chartered by the State were not subject to the equity jurisdiction of the Federal courts" is, of course, neither here nor there. (Reason No. 3, Petition p. 8.)

Entirely irrelevant, we further submit, is the allegation that the decision of the Circuit Court of Appeals is in conflict with the decision of the Supreme Court of Pennsylvania in the case of *Commonwealth Et Al. v. Penn General Casualty Company*, 316 Pa. 1 (1934). The jurisdiction of the Federal Courts is derived, not from decisions of State Courts, but from the Constitution and from Congress. As pointed out by the Circuit Court in the case of *Commonwealth of Pennsylvania v. John G. Williams Et Al., Receivers of Mortgage Building and Loan Association*, (see Record in that case at p. 93):

> "A state cannot take away the plenary power of the federal courts given to them by Congress, by conferring exclusive jurisdiction of such controversy upon its own courts and administrative bodies, by prescrib-

ing exclusive methods of commencing or conducting litigation, by prohibiting the seizure of the subject of the litigation during its pendency, or by any other means (citing cases)." (Reason No. 4, Petition p. 8.)

Nor, we submit, is it ground for *certiorari* that the District Court appointed receivers after the Secretary of Banking had taken possession of the Association's assets thereby creating 'an impossible situation'. A more naive proposition cannot be imagined. Eight days *after* the District Court had acquired jurisdiction by the filing and serving of the Bill, and while a motion for the appointment of receivers was pending, the petitioner in open defiance and disregard of the District Court took possession of the assets of the Association. It is from this 'impossible situation' that the petitioner now prays to be rescued. (Reason No. 6, Petition p. 9.)

We submit, therefore, that no reasons are exhibited why there should be allowance of *certiorari* herein.

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## ARGUMENT.

Since the petitioner's argument, in the main, follows his argument in support of his simultaneous petition for a writ of *certiorari* in the case of *Commonwealth of Pennsylvania v. John G. Williams, et al., Receivers of Mortgage Building and Loan Association,* the respondents adopt the brief filed in opposition to that petition as adequate answer to the legal propositions raised in that cause and which are the legal propositions in this cause.

There are, however, definite factual differences between the Mortgage Building and Loan case and the instant case which tend to make the instant case much stronger.

In the Mortgage Building and Loan case the petitioner contends that before the Bill was filed it was definitely exercising control over the Association, and further, that that case has in it the element of 'consent decree'.

Such considerations do not apply to the instant case.

In the instant case the petitioner frankly admits that rather than exercise control over the Association as he legally could have done, he had not even examined the affairs of the Association! He was totally ignorant of its financial condition even when he defied the District Court, and, without notice to the complainants or the Court, took possession of the Association eight days *after* the complainants had served their Bill (R. 20, par. 13). And was "the liquidation proceeding at a minimum of expense and without wastage of assets" (Petition p. 21) when the petitioner permitted the very officers who were then under criminal indictment for, and subsequently convicted of, the looting of the Association to remain in active management thereof?

There is no element of 'consent decree' in the instant case. The District Court did not act until an Answer to the Bill had been filed by the petitioner, (not by an officer of the Association), and two hearings held. Counsel for the petitioner agreed that the matter be disposed of on Bill and Answer. Everything that was done by the complainants was done openly and only after ample notice to all parties concerned. It is only fair to state that two postponements were granted so that the petitioner could amend his Answer, but the petitioner chose to stand on the Answer as filed.

Even if it be conceded that the possession of the petitioner rises to the dignity of a Receivership, it is pertinent to here point out that the Circuit Court instead of disposing of the broad questions involved in the instant case could very well have sustained the action of the District

Court by ruling that the petitioner could not engage in an unseemly race with the District Court to acquire possession of the Association's assets. In *Harkin v. Brundage*, 276, U. S. 36, (1928) this Honorable Court said:

> TAFT, C. J. at p. 43: "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this Court. As between two courts of concurrent and coordinate jurisdiction, the court which first obtains jurisdiction, and constructive possession of property by filing the bill is entitled to retain it without interference, and cannot be deprived of its right to do so because it may not have obtained prior physical possession by its receiver of the property in dispute. . . ."

On October 8, 1934, this Honorable Court handed down a decision upon a petition for writ of *certiorari* in the case of *Mitchell v. Maurer*, 69 F. (2d) 233 (1934) in which case the legal question raised by the instant petition was also raised. The Court allowed an appeal, limiting it, however, to the question of whether the appointment of an ancillary receiver upon the petition of a domiciliary receiver was proper; thus apparently dismissing the appeal on jurisdictional grounds.

In its order the Court directed attention to the case of *McCandless v. Furland*, 68 F. (2d) 925 (1934) which is No. 11 on the Argument List for October 11, 1934. It would seem, therefore, that the legal question involved in this case was disposed of in that case by not allowing the appeal on the question of jurisdiction.

## CONCLUSION.

It is unfortunate that the petitioner concludes his brief thusly: "Avoiding the only issue in the case . . . the court below . . . confirmed the appointment of receivers . . . and . . . thereby sought to oust the control of the Secretary of Banking actually in possession as receiver of this institution, on the mere pretext that a bill of complaint was filed before the State Officer attempted to take possession" (Petition pp. 23, 24). This effort to make it appear that the complainants anticipated the action of the Secretary of Banking is a palpable twisting of the facts. In the instant case the complainants had no dealings or conversations with any State officers, and, of course, did not know what the petitioner would do. The Answer to the Bill clearly establishes that the petitioner was totally ignorant of the condition of the Association, and after the complainants had already acted it was the petitioner who anticipated the subsequent action of the District Court.

In addition to the hopeless insolvency of the Association the Bill and Answer made out a case of malfeasance as to the officers of the Association and a *prima facie* case of nonfeasance as to the petitioner. The inference is strong that the belated zeal displayed by the petitioner was with a view to covertly maintaining control of any legal proceedings to which he might be made a proper party. If this be the fact, then the proceedings resulting in the petitioner obtaining possession was an obvious attempt on his part to evade the consequences of the appointment of an independent receiver whose duty it might be to hold the petitioner responsible for the failure of the Association to the extent he was properly chargeable therewith.

The settled judicial policy of this Court is diametrically opposed to the continuance in control, directly, or indirectly of officials against whom is made out a case of wrong-doing in office, yet the petitioner here baldly permitted to remain in power the officers who were then under

indictment and later convicted of frauds in connection with this Association. That such a condition should have been tolerated is beyond comprehension; but that this Honorable Court should now be asked to place a stamp of approval on it is inconceivable.

No reason has been presented in support of the novel proposition urged by the petitioner—that the legal rights of non-residents of Pennsylvania as guaranteed by the Constitution of the United States be denied by the Federal Courts.

It is therefore submitted that the Petition should be refused by this Honorable Court.

Respectfully submitted,

OSCAR BROWN,
CHARLES POLIS,
*Attorneys for Respondents.*

Philadelphia, Pa.